POWER OF THE INTERSTATE COMMERCE COMMISSION TO AWARD DAMAGES

The original Act to Regulate Commerce was enacted in 1887. Its provisions upon the question of damages were crude and manifestly incomplete. In Section 9, it is intimated that any aggrieved patron of a railroad company may prosecute his claim for damages before the Commission. By Section 14, it is made the duty of the Commission to make a *recommendation* as to what reparation should be made to an injured person. By Section 15, it is provided that the Commission shall furnish to the offending carrier a copy of its report, and a notice to pay whatever damages the Commission has awarded. By Section 16, it is provided that if this order is not complied with, resort may be had, by any interested party, to a federal court of equity for redress.

It was at once appreciated that such courts of equity were without power to enforce an award of damages, since by the seventh amendment to the Constitution of the United States, jury trials are guaranteed in all common law actions involving more than twenty dollars. And so it was, that the Commission, as long as the act of 1887 remained unamended, declined to consider any questions of damages, realizing that to do so would be but to waste time in unfruitful investigations. But in 1889, Section 16 of the original act was so amended as to provide for jury trials in actions to recover damages awarded by the Commission, and thereafter, the Commission felt it to be its duty to consider requests for damages as well as complaints calling for relief of a quasi-legislative character.[1] Subsequent amendments to the act have served to clarify the right of the Commission to award damages and the procedure by which such damages can be collected.

For a considerable time after the amendment of 1889, the Commission seems to have entertained and decided demands for reparation without having given any particular consideration to the question of its jurisdiction. Thus, in one early case, damages were awarded by the Commission for discrimination in furnishing cars to a shipper of hay, the basis of damages being loss of profits on the commodity which he had sold, but was unable

[1] *Macloon v. Chicago & Northwestern R. Co.*, 3 I. C. C. 711.

to ship.[2] In another case, it was said that damages should be awarded on the basis of the fall in the market where there had been an improper refusal to deliver.[3] In other and earlier cases, damages were awarded for discrimination in furnishing cars, the damages being measured by loss of profits on commodities which should have been shipped but were not.[4]

The Commission, in its early days, however, was not always consistent in considering damage claims. For it appears that soon after its organization, it declined to entertain a complaint based on an alleged failure of the carrier to furnish proper and expedited service for perishable freight, saying that the shipper must seek his remedies in the courts.[5] Nor did the Commission assume to repair the mischief caused by goods being damaged in transit;[6] nor would it at a somewhat later date go into the question of damages for failing to make prompt delivery of fruit.[7] In this last mentioned case, the Commission apparently for the first time hints at the distinction between rate damages, so called, over which the jurisdiction of the Commission was undoubted, and general damages of the character there involved. But the decision rests chiefly upon the ground that the commerce act does not undertake to deal with or regulate such matters as the receipt and delivery of freight. However, the cause of action involved in this case, if any there was, arose in 1907, after the passage of the Hepburn Act, by the provisions of which the term "transportation" is made to include all services in connection with the receipt and delivery of property.[8] It may, therefore, well be doubted if this conclusion of the Commission rests upon a proper view of the scope and purpose of the act.

However, the Commission, a little later, was led to reconsider the question of the limitations upon its power in the matter of awarding damages, and in a very careful opinion, a majority of the Commission held that its jurisdiction was limited to considering "rate damages," that is to say, damages that occurred from the exaction of an unreasonable rate.[9] In that case, the Com-

[2] 11 I. C. C. 619.
[3] 12 I. C. C. 308.
[4] 10 I. C. C. 226; 10 I. C. C. 422.
[5] 4 I. C. C. 205.
[6] 6 I. C. C. 85.
[7] 15 I. C. C. 53.
[8] *C. R. I. & P. R. R. Co. v. Hardwick Elev. Co.*, 226 U. S. 423; *C. C. C. & St. L. Ry. Co. v. Dettlebach*, decided January 10th, 1916.
[9] 17 I. C. C. 361.

mission was asked to award damages because of the alleged failure and refusal of a carrier to deliver fruit at the proper receiving station, resulting in injury to the fruit, storage and demurrage charges, etc. The majority of the Commission held, three members vigorously dissenting, that it was the function of the Commission to pass only on questions which its expert knowledge made it particularly qualified to handle, and since questions involving general damages were ordinary court questions, the Commission should leave them alone. It was recognized that the Hepburn Act made delivery a part of transportation, but applying the method of the Supreme Court in the *Abilene Cotton Oil Company* case,[10] it was thought that the general scheme of the act restricted the Commission's authority to such damages as could be awarded as appurtenant to an issue involving questions of a technical nature committed by the act to the judgment and discretion of the Commission.

In the next case involving this principle, the Commission was disposed to go a step further in the matter of limiting its own jurisdiction. It was necessary for it to pass upon the legality of a rule for distributing coal cars in time of car shortage, and upon investigation found that the rule was unlawful because discriminatory. Thereupon arose the question of damages for this discriminatory treatment. The majority of the Commission felt that under the act it had no right to award such damages, although resulting from a violation of that section of the act prohibiting discrimination. The majority favored the view that reparation could be awarded by the Commission only in such cases as permitted an assessment of damages by the simple mathematical process of subtracting from the rate paid, the rate that should have been paid. If the ascertainment of damages involved the necessity for considering such evidence as is usually received and considered by the courts in cases of tort or for breach of contract, the majority felt that such issues should go to the courts.[11] But the Commission was constrained to retain the question of damages and to consider it further because of a certain decision of the Circuit Court for the Eastern District of Pennsylvania, in which it had been held that the Commission alone could award damages resulting from the operation of a discriminatory rule for car distribution.[12] While this view of

[10] 204 U. S. 426.

[11] *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 17 I. C. C. 356.

[12] 176 Fed. 748.

the law has not been upheld, yet the Commission felt that some possible injustice might result from its refusal to determine the fact and amount of damages, and accordingly did enter an order of reparation, based on loss of profits on coal not shipped and the enhanced cost of that which was shipped.[13]

It may be interesting here to note that the Circuit Court of Appeals and the Supreme Court upheld the Circuit Court of the Eastern District of Pennsylvania in its conclusion that there could be no suit at law, based on discrimination, until that discrimination had been declared by the Commission, but found it unnecessary to decide whether, after such discrimination had been found, the aggrieved party is free to proceed in a suit at law for his damages, or whether he must apply to the Commission alone for his relief.[14]

It would seem that this point has now been settled and in favor of the view that one damaged by the exaction of an unreasonable or discriminatory rate is not limited to the Commission as the only forum in which he may seek relief. Of course, the complainant, before he sues for damages in the courts, must be fortified with an order of the Commission condemning the rate, rule or practice which he claims to have injured him; but in the matter of damages, the Commission does not furnish his only remedy. This would seem inevitably to follow from the opinion of the Supreme Court in *Phillips v. Grand Trunk Western Ry. Co.*[15] For in that case, it was held that a shipper might maintain his suit in the courts on account of a rate found unreasonable by the Commission, even though he was not a party to a proceeding whereby the rate was condemned. Such a plaintiff had, manifestly, never submitted his claim for reparation to the Commission, and yet his right to sue in the courts was clearly announced:—and this view was anticipated by the Circuit Court of Appeals of the Seventh Circuit.[16]

The Supreme Court has also spoken upon another question, which was formerly much in dispute, and which, as we have seen, once divided the Commission. It now seems to be settled that the Commission has authority to award reparation in any case where it has jurisdiction to entertain a complaint as to the validity of a particular rate, rule or practice. We have noted

[13] 23 I. C. C. 186.
[14] 183 Fed. 929; 230 U. S. 304.
[15] 236 U. S. 662.
[16] 211 Fed. 65.

the fact that in the Hillsdale Case,[17] the Commission hesitated to award damages resulting from the application of a car distribution rule, although the rule was condemned as discriminatory. This hesitation grew out of the doubt in the mind of a majority of the Commission as to its power to assess damages except such as could be measured by a difference in rates. But in a very recent case, this doubt has been dissipated by a holding that whenever the Commission ascertains that any rate, rule or practice is either unreasonable or discriminatory, it has the power to assess damages.[18]

Other interesting questions remain undetermined by the court of last resort. One of these presents the question of the power of the Commission to act concurrently with the courts in awarding damages in instances not calling for the exercise of the Commission's exclusive authority. An illustrative case will, perhaps, best serve to present the question. A certain coal mine operator sought to recover damages from a railroad on account of its alleged failure to furnish coal cars. No question of discrimination in distribution was presented, nor did the complaint raise the point as to the sufficiency of the railroad's coal car supply. There was simply an allegation of demand, failure to furnish, and damages. The majority of the Commission held that it had jurisdiction to award damages, since the Hepburn Act made it the duty of carriers to furnish transportation upon reasonable request, and further defined "transportation" as including cars.[19] The opinion of the majority rests upon the proposition that its jurisdiction is exclusive.[20] The reasoning is that the Hepburn Act requires carriers to furnish cars upon reasonable request, and that whether the carrier has discharged its full duty in this respect is an expert question calling for the exercise of the judgment of the administrative tribunal which Congress has created to solve such questions. But the majority opinion holds that if mistaken in the view that it has exclusive jurisdiction, it remains true that the Commission in such matters has jurisdiction concurrent with the courts.

It would seem that two decisions of the Supreme Court have well nigh destroyed the view that the Commission's jurisdiction

[17] 17 I. C. C. 356.

[18] *Pennsylvania R. R. Co. v. Clark Bros. Coal Mining Co.*, 238 U. S. 456.

[19] 33 I. C. C. 52.

[20] *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson v. B. & O. R. R. Co.*, 222 U. S. 506; *U. S. v. Pacific & Arctic Ry. & R. Co.*, 228 U. S. 87.

is exclusive. For it has been held that a shipper who has been denied his fair share of cars may sue in the state courts, and recover damages where it appears that the case does not involve any consideration of the reasonableness of the rule, but merely a question as to whether the carrier has observed its own rule. Such a case, we are told, involves no administrative question, and the courts are therefore competent to decide it without the aid of the Commission. And since Section 22 of the Hepburn Act preserves all existing common law and statutory remedies, it was held that, the reasonableness of the rule not being involved, the shipper might sue in a state court, without having previously presented the question to the Commission.[21] And so, following this case, it was held that where a state statute merely declared the common law as to the duty of a carrier to furnish cars, suit might be maintained in a state court upon this state statute for so failing, there being no question of discrimination. This last case arose after the passage of the Hepburn Act, but the court expressly holds that there is nothing in this act to oust the jurisdiction of the courts in cases not calling for the exercise of the Commission's administrative functions.[22]

These cases seem to settle two questions: (1st) That a suit for failing to furnish cars, without other charge of misconduct, presents no administrative question; and (2d) That the courts may in the first instance be resorted to for recovery of damages in such cases. The jurisdiction of the courts in such cases being established, can it be said that the aggrieved party may resort at his option either to the courts or to the Commission? Or, in other words, does the Commission sit to repair every injury bottomed upon a breach of duty, provided that duty is enjoined by the Act to Regulate Commerce? It might, at first blush, seem so, since Section 13 gives to every person the right to resort to the Commission for redress, provided he is aggrieved by any act of the carrier in contravention of the provisions of the act. But it is reasonably clear that this language cannot be taken too literally. For the so-called Carmack Amendment, requiring every carrier to issue a bill of lading and making the initial carrier responsible for damages, is a part of the commerce act. Yet it will hardly be argued that suit will lie before the Commission for loss or damage to goods. The commerce act contains many criminal provisions, but the enforcement of these is not commit-

[21] *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121.
[22] *Illinois Central R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275.

ted to the Commission. Mandamus will lie under Section 23 of the act in certain cases, but, of course, only the courts can grant the writ.

And so it would seem that the broad language of Section 13 must be qualified by other portions of the act, and by considerations growing out of the very nature of the Commission's functions, as shown by a broad view of the act, considered comprehensively and in the light of its history and well understood purposes. For if, as declared in the Abilene Cotton Oil Company case, and others of the same tenor, the courts cannot act in any matter which is within the scope of the Commission's administrative powers, why should the Commission be considered as empowered with jurisdiction not only over the matters which it was created to handle, but over a class of controversies calling for no exercise of administrative functions, and over which the courts, indubitably, have jurisdiction if the plaintiff sees proper to invoke it? It seems to the writer that it is the sounder view and that it was the purpose of Congress to entrust to the Commission only such matters affecting carriers as called for the judgment of a body of experts, and that all other matters, being outside of the scope of the Commission's peculiar field, should be left for the courts. It is difficult to reconcile any other theory with the principles that underlie the cases defining the power of the Commission and the effect that must be given to its findings.

The Abilene doctrine (as it may be called for convenience in expression) does not pretend to justify itself by a consideration of the provisions of Section 9, interpreted according to the usual meaning of plain and simple words. The construction of the section is based upon a consideration of the whole scope of the act, interpreted in the light of the great purpose it was enacted to accomplish. It was considered that the Commission exists to insure reasonable and non-discriminatory treatment in respect to those complicated and technical matters with which only experts can satisfactorily deal. To the end that this may be accomplished, and the aim of Congress be carried out, very considerable liberties were taken with those portions of Section 9 that seemed to give individuals the option to resort either to the Commission or the courts for recovery of damages. Of course, all agree that the construction placed upon the act by the Supreme Court is a most commendable piece of judicial legislation, since, had the conclusion been otherwise, the effect would have been to defeat many of the beneficent ends which it was enacted to accomplish.

A similarly broad view should be taken of the question which we are considering here. It must be remembered that the accepted doctrine, whereby the Commission's findings are conclusive upon the courts,[23] rests upon the view that it was the purpose of the national legislature to create a body informed by experience and competent to render expert opinion upon questions of preference and discrimination in the treatment of its patrons by a common carrier. For this reason, doubtless, the awards of the Commission are to be taken as *prima facie* correct in suits to enforce them. Indeed, the Commission has the right simply to find the ultimate fact of damage, and such finding, without reference to underlying and evidential facts, must be accepted by the courts, unless disproven, as sufficient to support a judgment.[24] Now, how can it be said that this presumption, amounting in most cases to a conclusive presumption, can apply to cases in which no expert questions are presented? What good reason, consistent with the scheme of railway regulation, can be advanced for making the findings of the Commission *prima facie* correct, in a suit for failing to furnish cars, or for neglecting promptly to deliver freight, or for negligence in handling shipments? Quite obviously, it was not the purpose of Congress to encroach upon the domain of the courts in this class of litigation. The true view would seem to be that there are certain matters in which the Commission has exclusive jurisdiction. In all such matters, characterized by one court as quasi-legislative,[25] the Commission may, if the complainant so desires, give full relief by awarding damages, if the thing complained of be found unlawful. But even in such cases, the complainant is free to sue for damages in the federal courts after he has secured an order condemning the rate, rule or practice of which he complains, without submitting the question of damages to the Commission. Likewise may any other person sue in the federal courts for damages in the first instance if he can support his grievance with a specific order of the Commission establishing the carrier's wrong. But if it appears that the case for damages does not grow out of some rate, rule or practice calling for the exercise of the Commission's enlightened judgment, no good reason can be given, as the writer thinks, for the view that the Commission has jurisdiction.

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[23] 235 U. S. 314; 215 U. S. 452; 220 U. S. 235.
[24] 238 U. S. 473.
[25] 211 Fed. 65.